

STATE OF MONTANA
BEFORE THE BOARD OF
PERSONNEL APPEALS

In the matter of consolidated unfair labor practice charges
No. 24, 25, 38, 39, 46-87

LOCALS 283A AND 283B, THE)
AMERICAN FEDERATION OF STATE,)
COUNTY AND MUNICIPAL)
EMPLOYEES, AFL-CIO,)
Complainants)

vs.)

GEORGE KURKOWSKI, MAYOR, MILES)
CITY - CITY COUNCIL AND ALL)
REPRESENTATIVES THEREOF,)
Defendants.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing on the above captioned matter was held on
February 23, 1988, in the Council Chambers of Miles City -
City Hall. Arlyn L. Plowman was a duly appointed hearing
examiner for the Board of Personnel Appeals. The complain-
ants were represented by Nadlean Jensen, Sharon Donaldson
and Claude Cain. The defendants were represented by Kenneth
Wilson, George Kurkowski, Frank Tooke and Lawrence
Torstenbo.

II. BACKGROUND

1. On August 7, 1987, complainant, American
Federation of State, County and Municipal Employees,
AFL-CIO, Montana Council 9, Local 283A filed, with the Board

1 of Personnel Appeals, an unfair labor practice charge (ULP
2 24-87) against the defendants, George Kerkowski, Mayor,
3 Miles City - City Council, and all representatives thereof.
4 That charge was amended on September 14, 1987. The defen-
5 dants filed a timely response. On October 8, 1987, Joseph
6 V. Maronick, duly appointed investigator for the Board of
7 Personnel Appeals, issued an investigation report and
8 determination pursuant to Section 39-31-405 MCA finding
9 probable merit for the charge.

10 2. On August 7, 1987, complainant, American
11 Federation of State, County and Municipal Employees,
12 AFL-CIO, Montana Council 9, Local 283B filed, with the Board
13 of Personnel Appeals, an unfair labor practice charge (ULP
14 25-87) against the defendants, George Kurkowski, Mayor,
15 Miles City - City Council, and all representatives thereof.
16 That charge was amended on September 14, 1987. The defen-
17 dants filed a timely response. On October 8, 1987, Joseph
18 V. Maronick, duly appointed investigator for the Board of
19 Personnel Appeals, issued an investigation report and
20 determination pursuant to Section 39-31-405 MCA finding
21 probable merit for the charge.

22 3. On November 3, 1987, complainant, American
23 Federation of State, County and Municipal Employees,
24 AFL-CIO, Montana Council 9, Local 283A, filed with the Board
25 of Personnel Appeals, an unfair labor practice charge (ULP

1 38-87) against the defendants, George Kurkowski, Mayor,
2 Miles City - City Council, and all representatives thereof.
3 The defendants filed a timely response. On January 4, 1988,
4 Joseph V. Maronick, duly appointed investigator for the
5 Board of Personnel Appeals, issued an investigation report
6 and determination pursuant to Section 39-31-405 MCA finding
7 probable merit for the charge.

8 4. On November 3, 1987, complainant, American
9 Federation of State, County and Municipal Employees,
10 AFL-CIO, Montana Council 9, Local 283B filed, with the Board
11 of Personnel Appeals, an unfair labor practice charge (ULP
12 39-87) against the defendants, George Kurkowski, Mayor,
13 Miles City - City Council, and all representatives thereof.
14 The defendants filed a timely response. On January 4, 1988,
15 Joseph V. Maronick, duly appointed investigator for the
16 Board of Personnel Appeals, issued an investigation report
17 and determination pursuant to Section 39-31-405 MCA finding
18 probable merit for the charge.

19 5. On December 14, 1987, complainant, American
20 Federation of State, County and Municipal Employees,
21 AFL-CIO, Montana Council 9, Local 283B, filed with the Board
22 of Personnel Appeals, an unfair labor practice charge (ULP
23 46-87) against the defendants, George Kurkowski, Mayor,
24 Miles City - City Council, and all representatives thereof.
25 The defendants filed a timely response. On January 4, 1988,

1 Joseph V. Maronick, duly appointed investigator for the
2 Board of Personnel Appeals, issued an investigation report
3 and determination pursuant to Section 39-31-405 MCA finding
4 probable merit for the charge.

5 6. All of the above unfair labor practice charges
6 contained one or more counts wherein the complainants
7 alleged that the defendants violated the Montana Collective
8 Bargaining for Public Employees Act, Section 39-31-101 et
9 seq., MCA and engaged in or was engaging in an unfair labor
10 practice as defined in Section 39-31-401 MCA.

11 7. On December 18, 1987, the Board of Personnel
12 Appeals received from complainant, American Federation of
13 State, County and Municipal Employees, AFL-CIO, Montana
14 Council 9, Local 283A, a request to withdraw certain counts
15 contained within ULP 24-87 and ULP 38-87.

16 8. On January 4, 1988, the Board of Personnel Appeals
17 consolidated all of the above unfair labor practice charges
18 (ULP 24, 25, 38, 39 and 46-87).

19 9. On January 20, 1988, consolidated unfair labor
20 practice charges 24, 25, 38, 39 and 46-87 were noticed for
21 hearing with Arlyn L. Plowman as hearing examiner.

22 10. During the course of the hearing on this matter,
23 complainant, American Federation of State, County and
24 Municipal Employees, Local 283B and the defendants resolved
25 their dispute. Consequential to that resolution the parties

1 signed a stipulation agreement wherein complainant, American
2 Federation of State, County and Municipal Employees, Local
3 283B withdrew any unfair labor practice charges (ULP 25, 39
4 and 46-87) filed against the defendants. That stipulation
5 agreement (marked S-1 for purposes of identification) was
6 entered into the record of this matter.

7 11. No such agreement was reached between complainant,
8 American Federation of State, County and Municipal Employ-
9 ees, Local 283A and the defendants.

10 12. The remaining complainant, American Federation of
11 State, County and Municipal Employees, Local 283A alleges
12 that the defendants engaged in unfair labor practices when;

13 (a) On or about July 28, 1987, the defendants
14 told the officers of American Federation of State,
15 County and Municipal Employees, Local 283A they
16 would be receiving a positive response to the
17 grievance they had filed. The following day the
18 defendant told the complainant the grievance would
19 not be adjusted in the matter previously indicat-
20 ed. Further, the defendant said, he would never
21 again deal with the complainant's authorized
22 agent.

23 (b) During or about the first week of August,
24 1987, upon receipt of the complainant's request
25 for mediation, the defendant told one of the
complainant's officers that the complainants were
heading in the same direction as the air traffic
controllers. Further, the defendant stated that
the complainant's union representative was trying
to save face by requesting mediation since she
knows she cannot do anything for the complainants
otherwise.

(c) On August 14, 1987, the defendant spoke to
groups of the complainant's members informing them
that he had received his unfair labor practice

1 charge and said, "Thank you for being such
2 assholes, and I hope I can return the favor
3 someday".

4 (d) On or about August 17, 1987, another of the
5 complainant's officers was called into the defen-
6 dant's office. That officer brought with him a
7 union steward to serve as a witness. The defen-
8 dant demanded that the witness leave. After the
9 witness had gone, the defendant told the complain-
10 ant's officer that he had been served with an
11 unfair labor practice complaint and then went on
12 to say, "I can't believe that you are doing this
13 after all the things I have done for the union.
14 You know you are acting like assholes and I hope I
15 can return the favor someday".

16 (e) On Tuesday, October 27, 1987, at a bargaining
17 session with a mediator present, the defendant
18 interrupted the session complaining that the
19 mediation process could not proceed until the
20 various unfair labor practice charges were re-
21 solved.

22 (f) On Wednesday, October 28, 1987, the defendant
23 presented to members of the complainant's bargain-
24 ing team a proposal that the defendant would give
25 all city employees, union and non-union alike, a
5% wage increase and the defendant would pick who
and how many employees would be laid off to fund
the increase. The complainant's representatives
asked the mediator to advise the defendant that
they would take the proposal back for a vote of
their membership.

19 After receiving the above proposal, as the
20 complainant's bargaining representatives were
21 leaving City Hall, the defendant demanded that
22 they stay until contract negotiations were com-
23 plete saying, "You guys think you're so smart for
24 filing charges against me, now you are going to
25 stay and negotiate". The defendant was advised by
the complainant's representatives that they would
present the employer's latest proposal to the
membership for a vote at the next meeting some
seven days away, November 4, 1987. The defendant,
still shouting, demanded the complainants get
their members together and hold their meeting
immediately. The complainant's representative

1 explained that this was impossible since special
2 meetings require a 15-day notice and that the
3 regular meeting would occur much sooner. The
4 defendant demanded that the complainant's repre-
5 sentative come into his meeting room and use his
6 telephone to call their membership for a poll
7 immediately in the defendant's presence. Again,
8 the complainant's representative explained that it
9 was against the law and the union constitution,
10 but that they would advise him in writing of the
11 results of the membership vote to be taken on
12 November 4, 1987. The complainant's representa-
13 tive then left the building with the defendant
14 still shouting at them to return.

15 (g) The morning following the incident set forth
16 in paragraph (f) above, the defendant held a
17 meeting with various city department heads and
18 instructed them to hold mandatory departmental
19 meetings with their employees that same day. At
20 approximately noon on that day the department
21 heads met with the various employees as instructed
22 by the defendant and told their employees that
23 they should vote on the mayor's last proposal
24 immediately and two police officers and seven
25 employees of the Department of Public Works would
be laid off. There were not to be any layoffs in
the police dispatch, water/waste water, licensed
personnel or the fire department (which is in a
different bargaining unit and had already settled
its' contract with the city for a freeze and would
now receive a 5% wage increase and suffer no
layoffs). All city employees not laid off would
receive the 5% wage increase. Police officers
would be demoted because of the layoffs. The
employees were advised that they could take a
freeze or that they could choose to give no answer
at all. In any case, the department heads were to
get back to the defendant immediately with the
employees' decision.

The complainant's union representative was
not advised of or asked to attend this meeting and
had no knowledge of it until the employees who
were in attendance reported it to the
representative.

III. FINDINGS OF FACT

1. At all relevant times complainant American

1 283A was recognized as the exclusive collective bargaining
2 representative for certain employees of the defendant.

3 2. At all relevant times defendant George Kurkowski
4 was mayor of Miles City. At the time of the hearing in this
5 matter his term had expired, Miles City had changed its form
6 of government and George Kurkowski no longer held a relevant
7 position with the Miles City - city government.

8 3. The events giving rise to the complainant's unfair
9 labor practice charges occurred between June and December
10 1987, a period during which the complainant and the defen-
11 dants were engaged in contract negotiations.

12 4. While those negotiations were difficult and at
13 times bitter, they resulted in a tentative agreement which
14 has since been ratified and implemented.

15 5. On July 23, 1987, the complainant filed a griev-
16 ance with the defendants regarding the application of the
17 collective bargaining agreement agency shop provision to
18 temporary and seasonal employees. On or about July 27,
19 1987, in a conversation with several of the complainant's
20 officers, defendant Kurkowski indicated that he expected to
21 grant this grievance. However, after consulting with the
22 City Attorney, Kurkowski denied the grievance on July 28,
23 1987 (exhibit B-2). The grievance was not processed
24 further through the grievance procedure. The evidence does
25 not show that the defendant refused to process the grievance.

1 not show that the defendant refused to process the grievance.

2 6. On several occasions defendant Kurkowski made
3 disparaging remarks about the complainant's union represen-
4 tative.

5 7. On at least one occasion defendant Kurkowski
6 predicted that the complainants were headed down the same
7 road as the air traffic controllers.

8 8. On August 14 & 17, 1987, after being served with
9 the original unfair labor practice charge in this matter,
10 defendant Kurkowski spoke to the complainant's officers and
11 members advising them that he had been served with a copy of
12 the unfair labor practice charge. He then went on to say,
13 "Thank you for being such assholes, I hope I can return the
14 favor someday". During a bargaining session on October 27,
15 1987, the defendant Kurkowski told the complainant's bar-
16 gaining team, "You guys think you're so smart for filing
17 charges with me, now you are going to stay and negotiate".

18 9. On October 27, 1987, during a mediation session,
19 the defendants attempted to have the unfair labor practice
20 charges resolved before continuing with the contract negoti-
21 ations. When advised that the complainants were not willing
22 to do so, the defendants resumed contract negotiations.

23 10. On October 28, 1987, after receiving a bargaining
24 proposal from the defendants, the complainant's bargaining
25 team advised the defendants that they would take the propos-

1 al back for a vote of their membership. Defendant Kurkowski
2 demanded the complainants hold a meeting immediately to
3 consider the defendants' proposal. After explaining that
4 they would not call such an immediate meeting, the complain-
5 ant's bargaining team left the bargaining session. The
6 evidence does not show that the defendants' proposal was
7 modified or withdrawn when the complainants refused the
8 defendants' demand for such an immediate ratification vote.

9 11. There was insufficient evidence submitted at the
10 hearing to support any findings regarding other charges made
11 by the complainant.

12 IV. CONCLUSIONS OF LAW

13 1. The Board of Personnel Appeals has jurisdiction in
14 this matter pursuant to Section 39-31-405 et seq., MCA.

15 2. The Montana Supreme Court has approved the prac-
16 tice of the Board of Personnel Appeals in using Federal
17 Court and National Labor Relation's Board (NLRB) precedents
18 as guidelines in interpreting the Montana Collective Bar-
19 gaining for Public Employees Act as the state act is so
20 similar to the National Labor Relations act, State ex rel.
21 Board of Personnel Appeals v. District Court, 183 Montana
22 223 (1979), 598 P.2d 1117, 103 LRRM 2297; Teamsters Local
23 #45 v. State ex rel. Board of Personnel Appeals, 195 Montana
24 272 (1981), 635 P.2d 1310, 110 LRRM 2012; City of Great
25

1 Falls v. Young (Young III), 686 P.2d 185 (1984), 119 LRRM
2 2682.

3 3. Pursuant to Section 39-31-401 MCA, it is an unfair
4 labor practice for a public employer to:

5 (1) interfere with, restrain, or coerce
6 employees in the exercise of the rights
7 guaranteed in Section 39-31-201 MCA;

8 (2) dominate, interfere, or assist in the
9 formation or administration of any labor
10 organization;

11 (3) discriminate in regard to hire or tenure
12 of employment or any term or condition of
13 employment in order to encourage or
14 discourage membership in any labor
15 organization;

16 (4) discharge or otherwise discriminate
17 against any employee because he has signed or
18 filed an affidavit, petition or complaint or
19 given any information or testimony under
20 Title 39 Chapter 31 MCA; or

21 (5) refuse to bargain collectively in good
22 faith with an exclusive representative.

23 4. Pursuant to Section 39-31-46 MCA the complainants
24 case must be established by a preponderance of the evidence
25 before an unfair labor practice may be found. Board of
Trustees the State of Montana, 103 LRRM 3090, 604 P.2d 770
(1979); see also Indiana Metal Products v. NLRB, 31 LRRM
2490, 202 F.2d 613, CA 7 (1953) and NLRB v. Kaiser Aluminum
and Chemical Corporation, 34 LRRM 2412, 217 F.2d 366, CA 9
(1954).

5. Pursuant to Section 39-31-406 MCA if, upon the
preponderance of the testimony taken, the Board is of the

1 opinion that any person named in the charges has engaged in
2 or is engaging in an unfair labor practice, the Board shall
3 state its findings of fact and shall issue and cause to be
4 served upon the person an order requiring him to cease and
5 desist from the unfair labor practice and to take such
6 affirmative action as will effectuate the policies of this
7 Title 39 Chapter 31 MCA. However, if upon the preponderance
8 of the evidence taken the Board of Personnel Appeals is not
9 of the opinion that the person named in the charge has
10 engaged in or is engaging in an unfair labor practice, then
11 the Board shall state its findings of fact and shall issue
12 an order dismissing the complaint.

13 6. The complainants' allegations can be divided into
14 three categories;

- 15 (1) the defendants failed their duty to
16 bargain in good faith;
- 17 (2) the defendant interfered with the
18 administration of the complainant's
labor organization;
- 19 (3) the defendant retaliated against the
20 complainant's officers and members
because unfair labor practice charges
21 had been filed.

22 7. Pursuant to Section 39-31-305 MCA good faith bargaining
23 is defined as the mutual obligation of the public employer
24 or his designated representatives and the representatives of
25 the exclusive representative to meet at reasonable times and
negotiate in good faith with respect to wages, hours, fringe

1 benefits, and other conditions of employment or the
2 negotiation of an agreement or any question arising
3 thereunder and the execution of a written contract
4 incorporating any agreement reached. Such obligation does
5 not compel either party to agree to a proposal or require
6 the making of a concession.

7 8. The preponderance of the evidence submitted during
8 the hearing does not show that the defendant failed to
9 fulfill its duty to bargain in good faith.

10 9. The preponderance of the evidence submitted during
11 the hearing does not show that the defendant's disparaging
12 remarks about the complainant's union representative, and
13 the defendant's prediction that the complainant was headed
14 down the same road as the air traffic controllers, inter-
15 fered with, restrained, or coerced employees in their
16 exercise of the rights guaranteed in Section 39-31-201 MCA.
17 Nor does the preponderance of the evidence show that the
18 aforementioned statement of the employer constituted an
19 unfair labor practice of the employer pursuant to Section
20 39-31-401 MCA.

21 10. No authority has been offered or found to support
22 a conclusion that the defendant's October 28, 1967 demand
23 that the complainant immediately call a meeting of its
24 membership to consider the defendant's proposal interfered
25 with the administration of the complainant's labor organiza-
tion in violation of Section 39-31-401 (MCA).

1 11. Language similar to that in Section 39-31-401 MCA
2 has been described as a broad remedial provision that
3 guarantees that employees will be able to enjoy their rights
4 secured by the collective bargaining law, including the
5 right to utilize the processes established by that law
6 without fear of restraint, coercion, discrimination, or
7 interference from their employer. Such language has been
8 liberally construed as prohibiting a wide variety of
9 employer conduct that is intended to restrain, or that has
10 the likely effect of restraining, employees in the exercise
11 of protected activities. See Hill Johnson Restaurant v.
12 NLRB, 113 LRRM 2649, 46 US731 (1983). Defendant Kurkowski's
13 statements to the complainant's officers and members wherein
14 he responded to being served with unfair labor practice
15 charges by referring to them as "assholes" and said, "he
16 hoped he could return the favor" were retaliatory. Likewise
17 his statement to the complainants bargaining committee, "You
18 guys think you're so smart for filing charges against me,
19 now you're going to stay and negotiate" was also
20 retaliatory. Such retaliatory acts violate Subsections 1
21 and 4 of Section 39-31-401 MCA. See NLRB v. Vulcan-Hart
22 Corporation, 106 LRRM 2992, 642 F.2d 255, CA 8 (1981); NLRB
23 v. Sure-Tan, Inc., 109 LRRM 2995, 677 F.2d 584, CA 7 (1982);
24 NLRB v. Ford Motor Company, 110 LRRM 3202, 683 F.2d 156, CA
25 6 (1982).

1 12. Conditions as they existed at the time of the
2 hearing do not warrant any affirmative action to effectuate
3 the policies of the Montana Collective Bargaining for Public
4 Employees Act, Section 39-31-101 et seq., MCA.

5 IV. RECOMMENDED ORDER

6 Pursuant to Section 39-31-406(5) those portions of the
7 complainant's unfair labor practice charges alleging that
8 the defendants, George Kurkowski, Mayor, Miles City - City
9 Council, and all representatives thereof failed to bargain
10 in good faith are hereby dismissed.

11 Pursuant to Section 39-31-406(5) those portions of the
12 complainant's unfair labor practice charges alleging that
13 defendant Kurkowski's remark about the complainant's union
14 representative and defendant Kurkowski's predictions regard-
15 ing the air traffic controllers was an unfair labor practice
16 as defined in Section 39-31-401 MCA are hereby dismissed.

17 Pursuant to Section 39-31-406(5) those portions of the
18 complainant's unfair labor practice charges alleging that
19 the defendants, George Kurkowski, Mayor, Miles City - City
20 Council, and all representatives thereof interfered in the
21 administration of the complainant's labor organization are
22 hereby dismissed.

23 Pursuant to Section 39-31-406(4) the defendants, George
24 Kurkowski, Mayor, Miles City - City Council, and all repre-
25 sentatives thereof are hereby ordered to cease and desist

1 from from taking retaliatory actions against the complain-
2 ants or any employee(s) who exercise(s) the rights
3 guaranteed in Section 39-31-201 MCA or who utilize(s) the
4 processes of the Board of Personnel Appeals.
5

6 IV. SPECIAL NOTICE
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8 Exceptions to these findings of fact, conclusions of
9 law and recommended order may be filed within twenty (20)
10 days of service thereof. If no exceptions are filed, the
11 recommended order shall become the final order of the Board
12 of Personnel Appeals. Address exceptions to the Board of
13 Personnel Appeals, P.O. Box 1728, Helena, MT 59624.
14

15 Entered and dated this thirty-first day of March 1988.
16

17 Board of Personnel Appeals
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19 
20 Arlyn L. Plowman
21 Hearing Examiner
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